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RUEHRI/AMCONSUL RIO DE JANEIRO 1971
RUEHAC/AMEMBASSY ASUNCION 5385
RUEHMN/AMEMBASSY MONTEVIDEO 6204
RUEHBU/AMEMBASSY BUENOS AIRES 3970
RUEHSG/AMEMBASSY SANTIAGO 5461
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E.O. 12958: N/A
TAGS: [ETRD](#) [KIPR](#) [BR](#)
SUBJECT: Brazil 2006 Special 301 Notification

REF: A) State 14937

¶1. (SBU) On April 27, Econ Counselor delivered USG talking points to Otavio Brandelli, the chief of the Ministry of External Relations's IPR office. Speaking informally, Brandelli termed the USG's decision to maintain Brazil on the 2006 Priority Watch List as both "unpleasant" and "lamentable." Observing that up to now the United States and the GOB have enjoyed excellent cooperation on IPR issues, he wondered whether this relationship could continue in light of the USG's decision.

¶2. (SBU) In response to our points on pharmaceutical patents, Brandelli specifically noted that 1) drug test data were "totally protected by Brazilian law," and 2) the new examiners the national patent office (INPI) was in the process of hiring would eliminate the patent backlog. He added that the time-frame for protecting patents under review was automatically extended in the case of delay, and that pipeline protection was not obligatory under TRIPs.

¶3. (U) Late in the afternoon of April 28, subsequent to USTR's announcement of the Special 301 decisions, the Ministry of External Relations issued the following press release.

BEGIN TEXT OF INFORMAL TRANSLATION OF PRESS RELEASE

Intellectual Property: Continuation of Brazil on the U.S. Priority Watch List

The Brazilian government received with displeasure the U.S. government's April 28 announcement of its decision to maintain Brazil on the Special 301 trade legislation Priority Watch List. Brazil has been included in the Priority Watch List since 2002. In the view of the Brazil government, this situation does not reflect the reality regarding protection of intellectual property in the country. Four months ago, on January 13, 2006, the U.S. government terminated the administrative review that threatened to withdraw Brazil's tariff benefits under GSP. This was done in recognition of the noteworthy efforts that had been taken by the Brazilian government and society in combating copyright piracy and other crimes against intellectual property through the creation in the

Ministry of Justice of the National Anti-Piracy Council and the adoption of enforcement, educational, and economic measures.

The decision to maintain Brazil on the Special 301 Priority Watch List is not consistent with the standards of intellectual property protection enshrined in Brazilian law, which is completely compatible with the international commitments undertaken by Brazil in multilateral fora, such as the World Intellectual Property Organization (WIPO) and the WTO, and in particular the WTO TRIPS agreement.

The Brazilian government thus deplores the U.S. decision to maintain Brazil on the Priority Watch List, as this is inconsistent with the positive bilateral dialogue, on both the political and technical level, between the two countries on the issue of intellectual property. During the course of this dialogue, the Brazilian government at all times demonstrated an unequivocal constructive spirit.

Additional Information

Position of Brazil on the Special 301 Priority Watch List for the Past 10 Years

Year	Priority Foreign Country	PWL List	Watch List
1996			X
1997			X
1998			
1999	Brazil not on any list		X
2000			X

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2001			X
2002		X	
2003		X	
2004		X	
2005		X	
2006		X	

In the ambit of Special 301, based upon information furnished by the U.S. private sector (the pharmaceutical, software, motion picture, publishing, and recording industries, among others), the U.S. organization responsible for trade - USTR - publishes annually three lists of countries which, in the U.S. government's view, allegedly fail to offer adequate and effective protection of intellectual property: priority foreign countries, the Priority Watch List, and the Watch List.

12. The maintenance of Brazil on the Priority Watch List is incompatible with the high standards of Brazilian intellectual property legislation. Brazil has not only declined to take full advantage of the transition periods in the TRIPS agreement contemplated for developing countries (the year 2000 in general and 2005 for pharmaceutical patents), but, in some cases, has established in national legislation requirements stricter than those agreed to in the WTO. The Brazilian law implementing TRIPS were all enacted before 2000: the industrial property law in 1996 (Law # 9,279/96), vegetable/cultivation varieties in 1997 (Law # 9,456/97), copyright in 1998 (Law # 9,610/98) and software also in 1998 (Law # 9,609/98). Specifically, with respect to pharmaceutical patents, the time-frame for allowing them could have been the year 2005, but instead, however, they were legalized in the Industrial Property Law (IPL) of 1996.

13. In substantive terms, the Brazilian IPL granted so-called "pipeline" patent protection -- not contemplated in the TRIPS

agreement - for the time remaining on patents in areas previously excluded from patentability (pharmaceuticals, chemicals, and foodstuffs) that before, by law in Brazil, fell into the public domain. Regarding copyrights, its worthwhile mentioning the following provisions of TRIPs-plus character adopted in the Brazilian juridical framework: (a) the protection period for property rights (articles 41 and 44, Law # 9,610/98) is 70 years when in TRIPs the period is 50 years (article 12); (b) while under TRIPs the right to authorize licenses must be allowed, at the minimum, for computer programs and cinematographic works (article 11, Law # 9,610/98), Brazilian law provides for licensing rights for all property protected by copyright, including phonographic works (article 29), (c) Law # 9,610/98 confers on phonogram producers exclusive rights to authorize, or prohibit, not only the direct or indirect reproduction of phonograms, but also the distribution through sale or rental; the divulgation to the public through public performances; and through any other methods, existing or which come to be invented. For its part, TRIPs, only provides for "the producers of phonograms to enjoy the right to authorize or license the direct or indirect reproduction of their phonograms."

14. In 2004, after the conclusion of the Chamber of Deputies Congressional Investigative Commission (CPI) on Piracy, the President of the Republic decreed the creation of a National Anti-Piracy Council (CNCP). The CNCP represents an unprecedented qualitative leap in the coordination between public and private organs in Brazil. Diverse piracy and counterfeiting enforcement operations took place under the coordination of the CNCP during the course of 2004 and 2005. According to Receita Federal [the Brazilian IRS-equivalent] data, in 2005 there was an increase of 32.8 percent in the amount of merchandise apprehended compared to 2004, constituting a record total of R\$601 million - R\$149 million more than in the year 2004. The apprehension of illegal media by

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the Federal Highway Police in the first 4 months of 2006 (2.2 million) practically equals the apprehensions for both the years 2005 (2 million) and 2004 (450,000) put together. The Federal Police detained 1,200 smugglers in 2005, 30 times more than in 2004 (39). Among the various public education efforts, the Government launched the "Pirata to for a; so uso original" campaign (a partnership between the CNCP and the SINDIRECEITA), in addition to education programs aimed at schools, colleges, and universities. In the various States of the Brazilian federation, diverse regional initiatives were also implemented.

15. Its worthwhile highlighting at this juncture that the recurring U.S. allegations about losses in the Brazilian market due to the violation of intellectual property rights are relative. During the past 10 years, the repatriation of foreign exchange from Brazil to the United States originating from intellectual property rights grew from US\$161.31 million in 1994 to US\$1.04 billion in 2004, an increase of 550%.

16. The decision announced by USTR on 1/13/06 to terminate the investigation under Section 502 of U.S. trade law regarding the allegation of inadequate protection of copyright in Brazil and to maintain in full the preferences accorded the country under GSP, in and of itself recognizes the advances made by Brazil on the issue of enforcement. One would have expected, however, that the U.S. government decision would have been consistent with that on GSP, with Brazil being withdrawn from the list in the 2005 Special 301 review.

17. Other elements, moreover, reinforce the perception that the inclusion of Brazil on the Special 301 list is inopportune and inadequate:

PROCESSING OF PATENT REQUESTS: The exponential increase in requests for patents worldwide, tied with the fact that Brazil had included "pipeline" patents and areas previously excluded from patentability in the 1996 LPI, has led to the relative delay in the patent process, although INPI has begun to remedy this by hiring 440 new employees. Those posts have been created by the Federal Government and the selection process is ongoing; 60 new workers are currently being trained. In addition to this, Article 40 of the LPI

contemplates extension of a patent's term in cases where there has been a prolonged delay in examining that patent. Up to now, however, there has been no verified delay in the examination of patents which would lead to the application of the cited article.

PRIOR REVIEW BY ANVISA: Law # 10,196/01, Article 229-C established that patent letters can only be granted for pharmaceutical processes and products after a prior review by ANVISA [Brazil's FDA equivalent]. ANVISA intervention in the examination of pharmaceutical patents constitutes a complex Executive Branch act; one cannot do without the "expertise" of that agency in the area of drug medications as until the 1996 LPI pharmaceuticals were not patentable in Brazil.

COMMERCIAL REGISTRATION/TEST DATA/CONFIDENTIALITY: Article 39.3 of the WTO TRIPS agreement establishes the duty to protect confidential information contained in commercial registration requests presented to sanitary authorities - given that the development of such involves considerable effort. Protection is accorded against any disloyal commercial use. However, the same article mentions that where necessary to protect the public such information may be released. The TRIPS agreement deals with the question of protecting confidential information under the rubric of disloyal competition

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and not as a property rights matter. Based upon the obligations imposed by the TRIPS agreement, the Brazilian Industrial Property Law (Law # 9,279/96) establishes a specific penal category for these types of disloyal competition offenses (Article 195, section XIV, paragraph 2). ANVISA fully respects these legal standards as it takes care to guard the confidentiality of information presented by companies in registration requests, watching out for any anti-competitive practices.

VOLUNTARY LICENSING OF ANTI-RETROVIRAL MEDICATIONS (ARVs): Given

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the necessity to make the DST/AIDS program sustainable [Brazil's national anti-AIDS program], with universal, free access to treatment in conformity with Law 9313/96, in 2005 the Ministry of Health initiated the process of negotiating voluntary licenses of ARVs with three U.S. laboratories. The negotiations with one laboratory were concluded satisfactorily on 10/11/2005 via an understanding between the parties. The negotiating process continues with two other laboratories. While international agreements and Brazilian industrial property legislation establish and make available the instrument of compulsory licensing, Brazil - contrary to the perceptions of U.S. public opinion - never took the step of "breaking patents and instead put priority on understandings based on non-compulsory actions.

TRANSGENIC SOY: In the past, the "American Soybean Association (ASA" presented to the Special 301 Committee a petition to "identify Brazil for denying adequate and effective protection of patent protection laws applicable to the use of genetically modified herbicide-resistant soybean seed developed by Monsanto Company (RoundUp Ready soybeans) by Brazilian farmers." Notwithstanding the allegations of that group, the Brazilian judicial system did not fail to guarantee to holders of the patent for "RoundUp" technology the right of indemnization for the unauthorized use of this technology.

18. Complementary information regarding the efforts undertaken by the Brazilian government in combating the violation of intellectual property rights, especially with respect to copyright, can be found in the National Anti-Piracy Council's Activity Reports available on the internet page:

<http://www.mj.gov.br/combatepirataria/relatorio.asp>

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